IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MANYARA

AT BABATI

MISC. CRIMINAL APPLICATION NO. 1 OF 2023

(Originating From Criminal Case No. 127/2022 District Court of Simanjiro)

FRANK GODFREY MSHANA.....1ST APPLICANT

NICOLOUS NGOO.....2ND APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

28th April & 2rd May, 2023

Kahyoza, J.

Frank Godfrey Mshana and **Nicolous Ngoo** are confronting an indictment of unnatural offence in the district court of Simanjiro. They instituted an application for Revision praying this Court to call for and examine the records of criminal case **No. 127/2022 (R. V. Franck Godfrey Mshana and Nocolous Ngoo)** for satisfying itself as to the correctness, legality, propriety of the order. The application was filed under section 371 of the Criminal Procedure Act, [Cap. 20 R.E. 2022] (the CPA).

The applicants enjoyed the services of Mr. Allen Godian learned advocate and the Respondent enjoyed the services of Ms. Blandina, learned state attorney. The applicants deponed and their advocate submitted that the applicants prayed for time to notify their advocate but the trial court did not respond. He summited that the trial court summoned the complainant who testified in the absence of their advocate.

The respondent opposed the allegation that the trial court denied them legal representation. She based her argument on the record of the trial court.

She argued that the record does not show that the issue of legal representation was raised by the applicants before the trial magistrate.

I am in total agreement that as the record bears testimony, the applicants did not raise the issue that they need time to engage an advocate. It is trite law that the court record accurately represents what happened. It should not lightly be impeached or parties be allowed to lightly impeach the court record. This position has been taken by the Court of Appeal in number of cases including **Iddy Salum @ Fredy v. Republic**, Criminal Appeal 192 of 2018 (unreported) and **Halfani Sudi v. Abieza Chichil** [1998] TLR 527, a few to mention. In the later as cited by the respondent's state Attorney held that-

> *"(i) A court record is a serious document; it should not be lightly impeached;*
>
> *(ii) There is always a presumption that a court record accurately represents what happened."*

If we allow parties to easily impeach the court record we should rest assured that it will be the order of the day and the use ground of appeal in all matters. It will cause anarchy. I took time to consider if there are strong reasons why the trial court should misrepresent facts and contemplated none. The applicants did not even depone and reason why they think the magistrate had any reason to do.

I find no merit in the allegation that the applicants raised the issue that they wanted time to engage an advocate and the trial magistrates not only kept mum but also omitted to record.

I now consider the allegation that the trial court did not comply with subsections (1), (2) and (3) of section 192 of the CPA. The applicants complain that the trial court transgressed the law above quoted by-

a) not holding a preliminary hearing in an open court. Their advocate submitted that subsection (1) of section 192 of the CPA requires the preliminary hearing to be held in open court even in a case where the accused person is charged with sexual offences.

b) not explaining to the accused persons who were not represented about the nature and purpose of the preliminary hearing. The applicants advocate argued that the law makes it mandatory for the court to explain the nature and purpose of preliminary hearing. He cited the provisions of sub section (2) of section 192 of the CPA;

c) not indicating that the memorandum of facts agreed not to be in dispute was read over and explained to the applicants. The applicants' advocate submitted that the applicants signed the memorandum but the trial court did not indicate that it read over the memorandum to the applicants before the signed it.

To support his position that the proceedings were nullity for failure to comply with the requirements of section 192 of the CPA, the applicants' advocate cited the case of **R. V. Abdallah Salum @ Haji Criminal**, Appeal No. 4/2019 (CAT unreported) where the Court relied on its earlier decision in **Kanuda Ngasa @Kingolo Mathias v. R.,** Cr. Appeal No. 247/2006 (CAT- unreported). In Court of Appeal in **Kanuda Ngasa @Kingolo Mathias v. R.,** held that-

> *"It is trite law that failure to prepare a memorandum of undisputed facts, or to read and explain the contents of the said memorandum*

to the accused is non-compliance with the mandatory provisions of the law. Where there is such non-compliance, as rightly argued by Mr. Magongo and Mr. Kakwaya, the provisions of section (4) do not come into play. Nothing shall be deemed to have been proved."

The Court in **R. V. Abdallah Salum @ Haji Criminal** having quoted the above, it held that-

"From the above holding it is clear that failure to read and explain to an accused person the memorandum of undisputed facts is non-compliance with section 192 (3) of the CPA, and that, it is the same as having not conducted a preliminary hearing."

The respondent's State Attorney vehemently opposed the submission. She contended that section 186(3) of the CPA states that the evidence of all persons in all trials involving sexual offences shall be received in camera. She argued that all proceedings were received in camera, hence the law was complied with.

She responded to other issues raised regarding section 192 of the CPA preliminary hearing that the applicants were involved in the whole process of preliminary hearing, they were called upon to reply to the facts adduced before them, they stated the matters which were not disputed and proceeded to sign the same showing that procedure required by section 192 of the CPA were complied with. Citing the case of **Director of Public Prosecutions v. Jaba John,** Criminal Appeal No 206/2020, CAT-unreported, stated that the Court held that-

"It is the position of the law that the aim of the preliminary hearing is to speed up trials so that matters which are not disputed will be

identified and thus witnesses to prove them will not be called to testify hence saving court's time and costs,

She submitted that the Court proceeded that-

"the law also states that failure or erroneous preliminary hearing only vitiates its proceedings and does not vitiate the proceedings of the trial."

She, then concluded that the application has no merit, it only aims at delaying the trial. She prayed the application to be dismissed.

In his rejoinder, the applicants' advocate reiterated his submission in chief.

I wish to point out at the outset, it is now settled that non-compliance with the provisions regulating the preliminary hearing *vitiates its proceedings and does not vitiate the proceedings of the trial.* See the decision of the Court of Appeal in **Juma Antoni v R.**, Cr. Appeal No. 571/2020 (CAT – unreported) where it was held that *"the preliminary hearing does not constitute an integral part of the trial".* In a criminal trial when the proceedings are vitiated, it is the accused person who stands a better chance to benefit. It is unthinkable for a person who takes advantage of the impropriety of the proceedings to complain vehemently and do so in violation of the laid down procedure. I will explain which procedure the applicants have violated by lodging the current application. I entertain doubts whether the applicants genuinely lodged the application under consideration. I am inclined to hold that the application was prompted by motive other than to see that justice is made to them. It is likely that the applicants are engaging delaying tactics as submitted by the respondents' state attorney.

Reading the affidavit in support of the application and the submission it is hard to grasp what mischief the applicants are all out to cure, which could not be cured at later stage. I did not see, even if the preliminary hearing proceedings were to remain on record, how the applicants will be prejudiced by the proceedings. The value of the preliminary hearing is in the undisputed facts which are considered proved and no evidence is required to prove them. The applicants denied all facts except their personal particulars compelling the prosecution to prove all facts. Thus, the proceedings of preliminary hearing is valueless and is as if it was not conducted. Given the position of the law regarding the preliminary hearing, which the applicants' advocate and the Respondent's state attorney properly stated, I find no genuine ground for the applicants' complaint against fatal proceedings which have no legal consequences. The complaint was therefore, a scam.

I stated that the applicants violated the law by lodging the current application without there being a disquieting feature or any sounding ground. The application was filed under section 372(1) of the CPA. Subsection (2) of section 372 prohibits an aggrieved person to lodge an application for revision against an interlocutory order or preliminary decision unless that decision has effect of finally determining the criminal charge. For clarity, I reproduce section 372 of the CPA, which read as follows-

> *"**372**.-(1) The High Court may call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any subordinate court.*

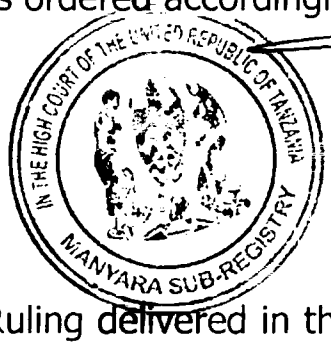
(2) Notwithstanding the provisions of subsection (1), ***no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of a subordinate court unless such decision or order has the effect of finally determining the criminal charge.*** *(Emphasis is added).*

Given the clear provisions of the law, one wonders why did the applicants defy the law and file the current application. The applicants did not endeavour to demonstrated, let alone establish that the there was a decision or an order of the trial court, which though interlocutory or preliminary in nature, had in effect determined the charge. The applicants are charged with unnatural offence. They have not alleged that the charge was in anyway determined. I am not sailing in unchartered waters as the Court of Appeal had considered the provision of the Court of Appeal Rules similar to section 372(2) in **Kweyambah Richard Quaker vs The Republic,** Criminal Appeal No. 19/ 2002, (CAT, unreported), **D.P.P v Samwel Mnyore ©Mamba and Ghati Msembe @Mnanka** Cr. Application No. 2/2012 (CAT, unreported) held in the former that-

"By that amendment (the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2002 [ACT NO. 25 of 2002]) *no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit."*

In the end, I find that the applicants have failed to demonstrate the incorrectness, illegality or impropriety of the order or proceedings of trial court. Consequently, I dismiss the application in its entirety. I further order the trial court's record to be immediately dispatched for continuation where it stopped.

It is ordered accordingly.



J. R. Kahyoza
Judge
2/5/2023

Court: Ruling delivered in the presence of Mr. Peter Utafu S/A assisted by Ms. Bernadeta Mosha and Peter Ndibalema for the republic, and in the presence of the applicants. B/C Ms. Fatina (RMA) present.

J. R. Kahyoza
Judge
2/5/2023

Order: The applications are required to appear before the district court on 19/5/2023 without failure.

J. R. Kahyoza
Judge
2/5/2023